Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

(2)

No. 94-1862

In The

# Supreme Court of the United States

October Term, 1994

MICHAEL WAYNE WILLIAMS,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. IS PETITIONER'S CASE AN INAPPROPRIATE VEHICLE FOR REVIEWING A SIXTH AMENDMENT CLAIM THAT THE PROSECUTOR IMPROPERLY COMMENTED ON THE CREDIBILITY OF THE DEFENDANT'S TESTIMONY:

(a) because petitioner's claim is barred from review to the extent it relies upon the prosecutor's argument to the jury?

(b) because the "conflict" relied upon by petitioner does not exist?

(c) because petitioner admitted in his trial testimony that he shot one of the victims in the head during the commission of robbery and rape?

II. DOES PETITIONER'S CLAIM THAT HE WAS ENTITLED TO INFORM HIS CAPITAL SENTENCING JURY THAT HE WOULD BE ELIGIBLE FOR PAROLE IN 25 YEARS RAISE A COGNIZABLE FEDERAL ISSUE?

III. DOES PETITIONER'S CHALLENGE TO VIRGINIA'S "VILENESS" AGGRAVATING CIRCUMSTANCE RAISE A COGNIZABLE FEDERAL ISSUE?

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**On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

## RESPONDENT'S BRIEF IN OPPOSITION

## OPINIONS BELOW

The Supreme Court of Virginia's opinion is published. *Williams v. Commonwealth*, 248 Va. 528, 450 S.E.2d 365 (1994). (Pet. App. 1a-22a). That Court's order denying Williams' petition for rehearing is unpublished but appears in the petitioner's appendix at 23a.

## STATEMENT OF THE CASE

On January 6, 1994, after a four-day trial, a jury in the Circuit Court of Cumberland County, Virginia, convicted the petitioner, Michael Wayne Williams, of burglary, rape,

arson, two counts of robbery, two counts of abduction, and five counts of capital murder. On the non-capital charges, the jury fixed Williams' punishment at 20 years for the burglary, life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, and 10 years for each of the abductions. The trial court imposed these sentences and entered final judgment on the non-capital charges in an order dated January 6.

After a separate day-and-a-half proceeding, the jury sentenced Williams to death for the capital murders of both Morris C. Keller, Jr., and his wife, Mary Elizabeth Keller, finding in both instances that Williams represented a continuing serious threat to society *and* that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. *See* Va. Code § 19.2-264.2. The trial court imposed both death sentences and entered final judgment on February 22, 1994.

Petitioner appealed only his capital murder convictions and death sentences to the Virginia Supreme Court, which affirmed on November 4, 1994. Williams' petition for rehearing was denied on January 13, 1995.

## STATEMENT OF FACTS

The undisputed evidence established that the petitioner planned and participated in the robbery and abduction of Mr. and Mrs. Keller that led to the rape of

Mrs. Keller and the execution-style murder of both victims. It also is undisputed that, at the very least, petitioner fired the first shot into Mr. Keller's head. All of the relevant facts are set forth in detail in the Virginia Supreme Court's opinion. (Pet. App. 2a-5a).

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. PETITIONER'S CASE IS A PARTICULARLY INAPPROPRIATE VEHICLE FOR REVIEWING A CLAIM THAT A PROSECUTOR VIOLATED THE SIXTH AMENDMENT BY IMPROPERLY COMMENTING ON THE CREDIBILITY OF A DEFENDANT'S TRIAL TESTIMONY.

Williams contends that the prosecutor violated his Sixth Amendment right to confront the witnesses against him and to be present at his trial by asking him questions on cross-examination and by making arguments to the jury that emphasized the fact that, by the time petitioner testified, he already had heard the testimony of all the other witnesses. This claim is not worthy of review for several reasons:

#### A. Petitioner's default below

Williams' claim in this Court relies not only upon the questions the prosecutor asked him on cross-examination but also on the prosecutor's jury argument. (Pet. 6, 15). In the Virginia Supreme Court, however, petitioner's claim focused solely on the former and never even mentioned the latter. (Resp. App. 1-3). And, of course, the Virginia Supreme Court did not purport to decide any claim other

than Williams' challenge to the prosecutor's allegedly improper cross-examination. (Pet. App. 15a). Indeed, if petitioner had raised a claim in the court below about the prosecutor's jury argument, the claim would have been doubly barred by his failure to object to the argument at trial, *see* Va. S.Ct. Rule 5:25 (requiring contemporaneous objection), and by Virginia's firmly-established rule that a claim of improper jury argument may not be litigated on appeal absent a request for a curative instruction or a mistrial. *See, e.g., Cheng v. Commonwealth*, 240 Va. 26, 38-39, 393 S.E.2d 599, 605-606 (1990).

When petitioner presented his cross-examination claim to the Virginia Supreme Court, moreover, he cited none of the cases upon which he presently relies. As the Supreme Court noted when it rejected the claim, "Williams cites no case in which such a question has been held to violate a defendant's constitutional rights, and we find none." (Pet. App. 15a). It therefore would be inappropriate to grant review of the court below's decision on the basis of authority petitioner never brought to the lower court's attention.

Regardless of whether the rule is couched in terms of jurisdiction or mere prudence, this Court generally will not review a constitutional claim that never was raised in the state court below. *See Yee v. Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). It is for this reason that a petitioner is required to detail for the Court how and when his constitutional claim was raised and decided in state court. Rule 14.1(h).

Petitioner's failure to raise and preserve that aspect of his claim which relies upon the prosecutor's jury argument renders his case unsuitable for certiorari review. This is particularly true in view of the fact that all but one of the cases upon which petitioner relies to support his "conflict" argument are based entirely upon a prosecutor's allegedly improper jury argument. (See Reason IB, below).

**B. Phantom "conflict"**

As many petitioners do, Williams asserts that the judgment below is at odds with the decisions of other courts and that the Court should grant review to resolve the "conflict." According to Williams, the Virginia Supreme Court's decision is in conflict with *Jenkins v. United States*, 374 A.2d 581 (D.C.), *cert. denied*, 434 U.S. 894 (1977); *Dyson v. United States*, 418 A.2d 127 (D.C. 1980); *State v. Rose*, 622 A.2d 78 (Me. 1993); and *Murray v. State*, 781 P.2d 288 (Nev. 1989). (Pet. 9-11). A review of these cases, however, demonstrates that there is no true "conflict."

As previously noted, all but one of the four cases are based entirely on the prosecutor's allegedly improper argument to the jury. *See Jenkins*, 374 A.2d at 583-584; *Dyson*, 418 A.2d at 131; *Rose*, 622 A.2d at 78-79 (based only in part upon prosecutor's cross-examination); *Murray*, 781 P.2d at 290. Petitioner has failed to preserve any claim with respect to the prosecutor's jury argument.

Neither *Jenkins* nor *Rose* supports petitioner's "conflict" argument because in both cases the court found no error that warranted reversal. In *Jenkins*, the prosecutor's

comments were ultimately deemed harmless. *Jenkins*, 374 A.2d at 584-586. In *Rose*, the court ruled that the prisoner had not preserved his claim for review because he had failed to request a mistrial. *Rose*, 622 A.2d at 79. Those cases, therefore, clearly do not conflict with the judgment in Williams' case.

*Dyson* does not support the "conflict" argument because at no time did the court explicitly rule that the prosecutor's comments violated the Constitution. To the contrary, the court ruled only that it had "repeatedly expressed disapproval of such tactics." *Dyson*, 418 A.2d at 131. Moreover, the court found the comments prejudicial in *Dyson* only because the government's case was "entirely . . . circumstantial" and "weak" on a critical element of proof. *Id.* at 132. In petitioner's case, of course, the evidence of his guilt was both overwhelming and, for the most part, undisputed. *Dyson*, therefore, is properly read as the decision of an appellate court exercising its supervisory power over a trial court.

Finally, *Murray* cannot support petitioner's argument because, unlike Williams' Sixth Amendment claim, it is based upon a violation of a defendant's Fifth Amendment right to remain silent at the time of his arrest. *Murray*, 781 P.2d at 290-291. At no time in that case did the prosecutor question the defendant about or comment upon the fact that he had heard all of the witnesses testify before he took the stand.

This Court should not grant certiorari to resolve a conflict that is not squarely presented. *See* Rule 10.1. Clearly, none is squarely presented here.[1]

### C. Petitioner's admissions at trial

According to Williams, the prosecutor should not have been permitted to impeach the credibility of his trial testimony by commenting on the fact that he had had the advantage of hearing all the witnesses testify before he took the stand. This contention, however, must be viewed in light of the fact that, even if the jury had credited petitioner's testimony in its entirety, he unquestionably was guilty of capital murder.

It is undisputed that Mr. and Mrs. Keller were premeditatedly murdered during the course of a robbery in which petitioner was a full and willing participant. It also is undisputed that Mrs. Keller was raped. And, as the Virginia Supreme Court noted, while the testimony of the petitioner and that of the co-defendant who testified against him were at odds on some of the details of the crimes, petitioner admitted before the jury that he was

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[1] In *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court held unconstitutional a state statute requiring that a criminal defendant testify as the first defense witness or not at all. The Court, however, was careful "not to imply that there may be no risk of a defendant's coloring his testimony to conform to what has gone before" and expressly noted that "our adversary system reposes judgment of the credibility of all witnesses in the jury." 406 U.S. at 611. If, as *Brooks* indicates, the fact that the defendant testified after hearing all the other witnesses testify is a matter the jury may consider in assessing his credibility, then it also is subject to fair comment by the prosecution.

the one who initiated the idea of a robbery, that it was his idea to burn down the victims' house and, most importantly, that he shot Mr. Keller in the head after both victims were marched into the woods behind their home to be executed. (Pet. App. 4a). Thus, by Williams' own admission he was guilty of a premeditated murder during the commission of a robbery, subsequent to the commission of a rape and during the same act or transaction where another premeditated murder occurred. *See* Va. Code § 18.2-31(4), (5) and (7).[2]

Even if the Court hypothetically were inclined to review the type of Sixth Amendment claim petitioner is raising, it should do so in a case where the alleged error clearly affected the outcome of the case, *not* in a case such as petitioner's where the jury would have been required to find him guilty of capital murder even if the alleged error had not occurred and the jury fully credited his version of the crimes. This case simply is not an appropriate vehicle for reviewing Williams' claim.

## II. PETITIONER'S PAROLE ELIGIBILITY CLAIM DOES NOT RAISE A FEDERAL ISSUE.

Petitioner relies upon *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), and claims that his Eighth and Fourteenth Amendment rights were violated by the trial court's refusal to instruct the penalty-stage jury regarding

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[2] Under Virginia law, to be convicted of capital murder the defendant must be the "triggerman" in a premeditated killing, but need only be a principal in the second degree to the predicate felony. *See J. Briley v. Commonwealth*, 221 Va. 563, 571-573, 273 S.E.2d 57, 62-63 (1980).

his parole eligibility. On appeal, the Virginia Supreme Court rejected the claim, finding that *Simmons* is inapplicable to capital defendants who, like Williams, are eligible for parole. (Pet. App. 10a).

At the outset, it is clear that the sole basis for this Court's decision in *Simmons* is the Due Process Clause of the Fourteenth Amendment. *See Simmons*, 114 S.Ct. at 2196 (plurality); *id.* at 2201 (O'Connor, J., concurring). Thus, *Simmons* provides no support for Williams' Eighth Amendment claim. Indeed, *Simmons* expressly declined to reach the prisoner's Eighth Amendment claim. *See* 114 S.Ct. at 2193 n.4.[3]

To the extent petitioner raises a due process claim, his case clearly is distinguishable from *Simmons*. Both the plurality and concurring opinions in *Simmons* limit the

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[3] Likewise declining to reach the Eighth Amendment issue is the only post-*Simmons* case upon which petitioner relies, *Clark v. Tansy*, 882 P.2d 527, 531 (N.M. 1994). Petitioner admits that the New Mexico case is the only decision extending this Court's due process ruling in *Simmons* to cases where the prisoner is eligible for parole and that the remainder of the post-*Simmons* cases have held, as the Virginia Supreme Court has, that *Simmons* does not apply unless the prisoner is ineligible for parole. (Pet. 17). Aside from the obvious fact that a lone, aberrant case hardly represents the kind of "conflict" necessary to obtain certiorari review, the New Mexico case cannot constitute a true "conflict" because it is expressly based upon the fact that the prosecutor in that case implied to the jury that the defendant could be paroled in as little as ten years, when in fact he could not have been paroled until he was at least 86 years old. 882 P.2d at 530, 533. In petitioner's case, the prosecutor never mentioned the possibility of parole and by petitioner's own admission he would have been eligible for parole in 25 years, i.e., when he was only 51 years old.

due process requirement to those capital cases where the defendant would be *ineligible* for parole if he received a life sentence. *See* 114 S.Ct. at 2196 (plurality) ("In a State in which parole is available, how the jury's knowledge of parole availability will affect the [sentencing] decision . . . is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury . . . regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury"); *id.* at 2200 (O'Connor, J., concurring) ("In a State in which parole is available, the Constitution does not require . . . jury consideration of that fact").[4]

Williams concedes that, unlike the defendant in *Simmons*, he would have been eligible for parole in 25 years if he had received a life sentence. (Pet. at 7 n.3, 16). By *Simmons'* very terms, then, the Virginia Supreme Court's rejection of Williams' claim raises only an issue of state law. *See* 114 S.Ct. at 2200 (O'Connor, J., concurring) ("The decision whether or not to inform the jury of the possibility of early release is generally left to the States."). This Court, of course, has no jurisdiction to review matters of state law on certiorari. *See generally Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

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[4] To whatever extent Justice O'Connor's concurring opinion may be narrower than the plurality opinion of Justice Blackmun, her position (joined by the Chief Justice and Justice Kennedy) must be deemed controlling. *See Romano v. Oklahoma*, 114 S.Ct. 2004, 2010 (1994) (controlling effect given to concurring opinion that supplies the necessary fifth vote).

This Court repeatedly has denied certiorari in post-*Simmons* cases from Virginia raising the very same claim Williams is raising. *See, e.g., Cardwell v. Virginia*, 115 S.Ct. ___, No. 94-7930 (May 1, 1995); *Wright v. Virginia*, 115 S.Ct. ___, No. 94-8271 (Apr. 24, 1995); *Swann v. Virginia*, 115 S.Ct. 234 (1994). This Court's repeated denials of certiorari are "ample evidence" that the Court does not deem the claim worthy of review. *See Maggio v. Williams*, 464 U.S. 46, 51-52 (1983).

## III. PETITIONER'S CHALLENGE TO VIRGINIA'S "VILENESS" AGGRAVATING FACTOR DOES NOT IMPLICATE THE CONSTITUTIONALITY OF HIS DEATH SENTENCE.

At the guilt stage of a Virginia capital trial, the prosecution must prove not only that the defendant committed a premeditated murder, but also that the murder was committed in one of several enumerated aggravating circumstances. *See* Va. Code § 18.2-31. In petitioner's case, he was convicted of premeditated murder during the commission of robbery and rape, as well as the premeditated killing of two people as part of the same act or transaction. *See* Va. Code § 18.2-31(4), (5) and (7).

At the penalty phase of a Virginia capital murder trial, moreover, before the defendant even becomes eligible for a death sentence, the prosecution must prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" and/or that his conduct in committing the offense "was outrageously or wantonly vile, horrible or

inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *See* Va. Code § 19.2-264.4C. In petitioner's case, the jury found the existence of *both* "future dangerousness" and "vileness." Even then, however, the jury was free under Virginia law and the court's instructions to impose a life sentence rather than a death sentence. (Resp. App. 4).

Aggravating factors are not ends unto themselves; their constitutional function is to narrow the class of those eligible for a death sentence beyond those who commit any murder. *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988). In Virginia, this limiting function is accomplished at the guilt stage when the defendant is convicted of a narrow species of capital murder. Thus, when petitioner was convicted of three separate species of premeditated murder, no further narrowing was constitutionally required. *See Gregg v. Georgia*, 428 U.S. 153, 164 n.9 (1976) (approving constitutionality of state system where aggravator to be proved at penalty stage is that murder was committed during rape). Accordingly, even if petitioner's claim regarding Virginia's "vileness" aggravator had merit – and clearly it does not – it would raise only a matter of state law and would not affect the constitutionality of his death sentence. *See generally Michigan v. Long*, 463 U.S. at 1038 (no jurisdiction to review state law issues on certiorari).

Moreover, Virginia is a "non-weighing" State where aggravating circumstances do not play a decisive role in the jury's determination whether to impose a death sentence. *See Swann v. Commonwealth*, 247 Va. 222, 236-237, 441 S.E.2d 195, 205, *cert. denied*, 115 S.Ct. 234 (1994). In Williams' case, in addition to finding "vileness," the jury

also found the "future dangerousness" aggravator. (Pet. App. 2a). Thus, even if, hypothetically, Virginia's "vileness" factor were vague, the remaining "future dangerousness" factor would be sufficient to sustain his death sentence.[5] *See Stringer v. Black*, 112 S.Ct. 1130, 1137 (1992) ("In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty."). *See also Zant v. Stephens*, 462 U.S. 862, 884-891 (1983); *Clanton v. Muncy*, 845 F.2d 1238, 1243 (4th Cir.) (applying *Zant* to a Virginia capital case), *cert. denied*, 483 U.S. 1084 (1988).

Petitioner's vagueness challenge, moreover, simply has no merit. Vagueness review is required to be "quite deferential." *Tuilaepa v. California*, 114 S.Ct. 2630, 2632 (1994). So long as the aggravating factor has a "commonsense core of meaning," it must be upheld. *Id.* at 2635. The United States Court of Appeals for the Fourth Circuit repeatedly has upheld the constitutionality of Virginia's "vileness" factor as it has been construed, limited and applied by the Virginia Supreme Court. *See, e.g., Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994), *cert. denied*, 115 S.Ct.

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[5] In view of the fact that Virginia accomplishes the constitutionally-required narrowing function at the guilt stage and, moreover, is a "non-weighing" State, petitioner's assertion of a supposed "conflict" with decisions pertaining to aggravators in other States is irrelevant. It is no doubt for this reason that the Court repeatedly has denied certiorari petitions from Virginia prisoners raising claims identical to petitioner's. *See, e.g., Cardwell*, 115 S.Ct. ___, No. 94-7930; *Breard v. Virginia*, 115 S.Ct. 442 (1994).

1359 (1995); *Jones v. Murray*, 976 F.2d 169, 174-175 (4th Cir.), *cert. denied*, 113 S.Ct. 27 (1992); *Bunch v. Thompson*, 949 F.2d 1354, 1367 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 3056 (1992). This Court should defer to the Fourth Circuit's view. *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (deference warranted because lower federal courts "better schooled in and more able to interpret the laws of their respective States").

While conducting its mandatory review of petitioner's death sentence pursuant to Virginia Code § 17-110.1, the Virginia Supreme Court concluded that the jury's finding of "vileness" was "amply justifie[d]" by the evidence. (Pet. App. 21a). When the Virginia Supreme Court thus applied its limiting construction of the "vileness" circumstance, the Constitution required nothing more. *See Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).[6]

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[6] Petitioner is simply wrong when he asserts that language identical to Virginia's statutory "vileness" factor was held to be vague in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Indeed, such language expressly was upheld against a "vagueness" attack in *Gregg v. Georgia*, 428 U.S. at 201, 202 n.54. The problem in *Godfrey* was caused, *not* by the statutory language, but by the fact that the jury returned a truncated verdict that omitted the "in that it involved torture, depravity of mind, or an aggravated battery to the victim" language and by the Georgia Supreme Court's failure on appeal to cure that defect. *See Godfrey*, 446 U.S. at 426, 428. Neither defect is present in petitioner's case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# RESPONDENT'S APPENDIX

**VIRGINIA:**

**IN THE SUPREME COURT**

**MICHAEL WAYNE WILLIAMS,**

**Appellant,**

**v.** **Record No. 940445**

**COMMONWEALTH OF VIRGINIA,**

**Appellee.**

## BRIEF OF APPELLANT

Appellant, Michael Wayne Williams, defendant in the Circuit Court of the County of Cumberland, respectfully represents to this Court that he is aggrieved by the judgments of conviction and sentences entered herein on February 22, 1994.

* * *

## ASSIGNMENTS OF ERROR

* * *

25. The trial court erred in overruling Defendant's objection to the Commonwealth's question to the Defendant on cross-examination that he was the only witness who had sat through the trial and heard the testimony of every witness.

* * *

## QUESTIONS PRESENTED

* * *

26. Whether the trial court erred in overruling Defendant's objection to the Commonwealth's question to

the Defendant on cross-examination that he was the only witness who had sat through the trial and heard the testimony of every witness.

* * *

## ARGUMENT

* * *

XXI. THE TRIAL COURT ERRED WHEN, OVER WILLIAMS' OBJECTION, IT PERMITTED THE COMMONWEALTH TO ATTEMPT TO IMPEACH WILLIAMS' TESTIMONY BY REFERENCE TO WILLIAMS' EXERCISE OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT AND TO CONFRONT WITNESSES.

The trial court erred when, over Williams' objection, it permitted the Commonwealth to attempt to impeach Williams' testimony by reference to the fact that he was the only person permitted to observe the testimony of all witnesses. (App. 1212-14). The trial court's error impermissibly burdened Williams' exercise of his right to confront his accusers, to be present at all times during his trial, to present evidence in his favor and to compel process. U. S. Const., Amends. V, VI and XIV; Va. Const. Art. I, § 8; Va. Code Ann. § 19.2-259, 1950, as amended; *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Cox v. Commonwealth*, 227 Va. 324, 315 S.E.2d 228 (1984); *Faretta v. Commonwealth*, 422 U.S. 806, 819 (1975); *Harris v. New York*, 401 U.S. 222, 230 (1971).

The Commonwealth's attempts to impeach Williams on the grounds that he had heard the testimony of other witnesses is the functional equivalent of an attempt to require him to testify first or not at all, which is an

impermissible burden on his exercise of his constitutional rights. See *Brooks v. Tennessee*, 406 U.S. 605 (1972). Further, the Commonwealth's action was of the type condemned by the United States Supreme Court in *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin*, the Court concluded that comments by the court or prosecutor regarding the defendant's failure to take the witness stand were constitutionally impermissible. The Court characterized comment on the defendant's silence as "a penalty imposed by courts for exercising a constitutional privilege" in that it "cuts down on the privilege by making its assertion costly." *Id.* at 613.

The exercise of the right to present a defense may be burdened when a defendant elects to testify. He is exposed to proper cross-examination, which may impeach his credibility. The very existence of the right, however, may not properly be used to impeach him. The prosecution in this case used the mere presence of Mr. Williams as evidence with which to impeach him. The Court of Appeals, in a case involving a guaranteed right, has held that the courts may not permit a defendant's constitutional right not to be compelled to give evidence against himself to be used against him. *Farmer v. Commonwealth*, 10 Va. App. 175, 390 S.E.2d 775, 781 (1990).

In the instant case, the error can in no sense be seen as harmless. Important issues of guilt and punishment rested on the relative credibility of Williams and the co-defendant, Jeffrey Allen Cruse. The Commonwealth had plainly vouched for the credibility of Cruse. It cannot be said that its attempt to impeach Williams by his exercise of his constitutional right to be present and to present a defense was harmless.

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## PENALTY-STAGE INSTRUCTION

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

(1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.